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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES C. WALTERS, JR.,

Defendant and Appellant.

D071505, D072135

(Super. Ct. No. SCN358801;
SCN329905; SCN351956)

CONSOLIDATED APPEALS from a judgment of the Superior Court of San Diego County, Sim von Kalinowski, Judge. Affirmed as modified.

Britton Donaldson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Genevieve Herbert, Deputy Attorneys General, for Plaintiff and Respondent.

James C. Walters, Jr., raises two issues pertaining to fines, fees and penalty assessments in three cases.¹ In case SCN358801, a jury found Walters guilty of taking and driving a vehicle (Veh. Code, § 10851, subd. (a), count 1), buying or receiving a stolen vehicle (Pen. Code,² § 496d, count 2) and possessing a controlled substance for sale (Health & Saf. Code, § 11351, count 3). The trial court sentenced Walters to a total prison term of four years eight months. The court imposed a laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)) and a criminal drug program fee (Health & Saf. Code, § 11372.7, subd. (a)), and included a penalty assessment on both. Walters contends the trial court improperly imposed penalty assessments on the criminal laboratory analysis fee and a drug program fee. We reject this contention.

The court also imposed sentence following probation revocation in two earlier cases. In case SCN329905, the court imposed a previously stayed three-year term and ran this concurrently to the sentence imposed for case SCN358801. In case SCN351956 the court imposed a four-year concurrent term. Walters asserts the trial court improperly imposed certain fines in these probation revocation cases. As we shall discuss, we order the amended minute orders and amended abstract of judgment be corrected.

¹ These cases were consolidated below at sentencing. Defendant's two appeals, D071505 and D072135, were consolidated by this court on May 31, 2017.

² Undesignated statutory references are to the Penal Code.

DISCUSSION

I. *PENALTY ASSESSMENTS*

Subdivision (a) of Health and Safety Code section 11372.5, the laboratory analysis fee statute, provides: "Every person who is convicted of [specified drug-related offenses] shall pay a criminal laboratory analysis *fee* in the amount of fifty dollars (\$50) for each separate offense. The court shall increase the total *fine* necessary to include this increment. [¶] With respect to those offenses specified in this subdivision for which a fine is not authorized by other provisions of law, the court shall, upon conviction, impose a fine in an amount not to exceed fifty dollars (\$50), which shall constitute the increment prescribed by this section and which shall be in addition to any other penalty prescribed by law." (Italics added.)

Subdivision (a) of Health and Safety Code section 11372.7, the drug program fee statute, provides: "Except as otherwise provided in subdivision (b) or (e), each person who is convicted of a violation of this chapter shall pay a drug program *fee* in an amount not to exceed one hundred and fifty dollars (\$150) for each separate offense. The court shall increase the total *fine*, if necessary, to include this increment, which shall be in addition to any other penalty prescribed by law." (Italics added.)

Critically, the penalty assessments imposed by the trial court apply to fines and penalties, but not to fees. (§ 1464, subd. (a)(1) ["[T]here shall be levied a state penalty in the amount of ten dollars (\$10) for every ten dollars (\$10), or part of ten dollars (\$10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal

offenses."]; also Gov. Code, § 76000³.) Here, subdivision (a) of Health and Safety Code sections 11372.5 and 11372.7 describe the required payment as both a "fee" and a "fine." If the payments required by Health and Safety Code sections 11372.5 and 11372.7 are construed to be fines or penalties, then the penalty assessments would be proper.

Walters contends that the trial court improperly imposed penalty assessments on the criminal laboratory analysis and drug program fees under Health and Safety Code sections 11372.5 and 11372.7. Walters notes that the question whether these fees are really fines or penalties that are subject to penalty assessment presents a question of statutory interpretation and upon which the Courts of Appeal are split. Walters urges us to follow *People v. Watts* (2016) 2 Cal.App.5th 223 (*Watts*) and hold that the fees required by these two statutes are not subject to penalty assessment. (*Id.* at p. 235-237.)

Recently, this court analyzed the issue and concluded that the criminal laboratory analysis and drug program fees were punitive and subject to penalty assessment. (*People v. Alford* (2017) 12 Cal.App.5th 964, 974-977 (*Alford*), review granted Sept. 13, 2017, S243340); see also *People v. Moore* (2017) 12 Cal.App.5th 558, 570-571 [same, addressing laboratory analysis fee], review granted Sept. 13, 2017, S243387.) Other

³ Government Code section 76000, subdivision (a) states: "(1) Except as otherwise provided elsewhere in this section, in each county there shall be levied an additional penalty in the amount of seven dollars (\$7) for every ten dollars (\$10), or part of ten dollars (\$10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses, including all offenses involving a violation of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. [¶] (2) This additional penalty shall be collected together with and in the same manner as the amounts established by Section 1464 of the Penal Code. . . . [¶] (3) This additional penalty does not apply to the following: [¶] (A) Any restitution fine. [¶] (B) Any penalty authorized by Section 1464 of the Penal Code or this chapter. [¶] (C) [Certain specified] parking offense[s]. [¶] (D) The state surcharge authorized by Section 1465.7 of the Penal Code."

appellate courts have reached the same conclusion addressing only the laboratory analysis fee. (*People v. Sharret* (2011) 191 Cal.App.4th 859, 869-870; *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1251-1252; *People v. Jordan* (2003) 108 Cal.App.4th 349, 368; *People v. Turner* (2002) 96 Cal.App.4th 1409, 1413-1414; *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1256-1257; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1522.)

Pending guidance by our high court on this issue we adhere to the analysis set forth in *Alford* and conclude that the trial court properly imposed penalty assessments on the laboratory analysis and drug program fees.

II. FINES IN THE PROBATION REVOCATION CASES

A. Additional Background

When the trial court originally sentenced Walters in cases SCN329905 and SCN351956, it suspended execution of sentence and granted probation. In each case the court also imposed a \$300 restitution fine under section 1202.4, subdivision (b) (section 1202.4(b)), and imposed but suspended execution of a \$300 probation revocation restitution fine under section 1202.44.

After the trial court revoked probation and sentenced Walters in these cases it increased the fines and imposed additional fines. In case SCN329905, the court minutes listed \$1,800 for each fine imposed under section 1202.4(b), and section 1202.44. The felony minutes also listed a \$900 "additional restitution fine" that was "stayed until & unless supervision is revoked." The felony abstract of judgment for case SCN329905 reflected the same \$1,800 section 1202.4(b) restitution fines; however, item 9.a. listed a

\$1,800 parole revocation restitution fine imposed under section 1202.45 and deleted the \$900 "additional restitution fine."

In case SCN351956, the felony minutes listed \$2,400 as the amount for each fine imposed under section 1202.4(b) and section 1202.44. A \$1,200 "additional restitution fine" that was "stayed until &- unless supervision is revoked" was also listed. The felony abstract of judgment for case SCN351956 under item 9.a listed a \$2,400 parole revocation restitution fine imposed under section 1202.45, but left blank any fine under section 1202.44 and any additional restitution fine.

Walters filed a motion under section 1237.2, requesting correction of the abstract of judgment and related minute orders. He asked the court to correct the amount of the section 1202.4(b) and section 1202.45 fines imposed in cases SCN329905 and SCN351956 to reflect the \$300 amount originally imposed by the court when he was granted probation on each case.

The trial court granted Walters's request. The court ordered that the minute order for case SCN329905 "be corrected to delete the Restitution Fine of \$1,800 and corrected to \$300 as [previously] ordered," and the minute order for case SCN351956 "be corrected to delete the Restitution Fine of \$2,400 and corrected to \$300 as [previously] ordered." The court further ordered that the abstract of judgment be corrected to reflect the proper restitution fines.

The amended abstract of judgment listed \$300 as the amount for the section 1202.4(b) and section 1202.45 fines for cases SCN329905 and SCN351956. However,

the space where the probation revocation restitution fine imposed under section 1202.44 should have been entered was left blank for both cases.

B. *Analysis*

A trial court may impose a section 1202.4 restitution fine when it pronounces judgment and it may not increase the restitution fine when revoking a defendant's probation. (*People v. Perez* (2011) 195 Cal.App.4th 801, 805.) After revoking a defendant's probation, the trial court is not authorized to impose a second restitution fine because the original fine survives the revocation of probation. (*People v. Chambers* (1998) 65 Cal.App.4th 819, 822-823 ["the first restitution fine remain[s] in force despite the revocation of probation"].) An additional restitution fine imposed when probation is revoked is unauthorized and must be stricken from the judgment. (*People v. Urke* (2011) 197 Cal.App.4th 766, 779.) Additionally, by the express terms of the statutes, parole revocation restitution fines imposed under section 1202.45 and probation revocation restitution fines imposed under section 1202.44 must be the same amount as the restitution fines imposed under section 1202.4(b). (§§ 1202.45, 1202.44.)

The amended minutes correctly list the section 1202.4(b), and section 1202.44 fines at the original amount of \$300. The amended abstract of judgment, however, does not list the section 1202.44 fines. Accordingly, the amended abstract of judgment must be modified to list the probation revocation restitution fine under section 1202.44 of \$300 in both cases, which are now due.

Walters contends that the trial court appeared to impose the "additional restitution fine" under section 1202.45, but it improperly increased the fine amount. Walters argues

that the appropriate remedy is to strike the "additional restitution fine" of \$900 in case SCN329905 and \$1,200 in case SCN351956. The Attorney General asserts that the additional restitution fines of \$900 and \$1,200 listed in the June 15, 2017 minute orders were imposed under section 1202.45 and must be reduced to \$300. We agree with the Attorney General.

Section 1202.45 requires the court to impose a parole revocation fine in the same amount of the restitution fine "[i]n every case where a person is convicted of a crime and his or her sentence includes a period of parole." (§ 1202.45, subd. (a).) Although an appellate court cannot correct the trial court's failure to impose a discretionary fine if no objection was raised in the trial court (*People v. Tillman* (2000) 22 Cal.4th 300), the imposition of a parole revocation fine under section 1202.45 (which first requires the imposition of a restitution fine under section 1202.4) is mandatory and may be corrected by an appellate court despite *Tillman*. (*People v. Smith* (2001) 24 Cal.4th 849, 853.)

Here, the amended minute orders and the amended abstract of judgment properly include a parole revocation restitution fine under section 1202.45 in the correct amount of \$300. The parole revocation restitution fine is suspended and becomes payable if Walters begins serving a period of parole and his parole is revoked.

The amended minutes, however, also include additional restitution fines of \$900 and \$1,200. The Attorney General cited no authority for these additional restitution fines, and these additional restitution fines were properly omitted from the amended abstract of judgment. Accordingly, the June 15, 2017 amended minute orders should be modified to strike the additional restitution fines of \$900 and \$1,200.

DISPOSITION

The trial court is directed to modify: (1) the amended abstract of judgment to list the probation revocation restitution fine under section 1202.44 of \$300 in cases SCN329905 and SCN351956, which are now due; and (2) the June 15, 2017 amended minute orders in cases SCN329905 and SCN351956 to strike the additional restitution fines of \$900 and \$1,200. As so modified, the judgment is affirmed.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.